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No. 82-374

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT FLANAGAN, JAMES KEWSHAN,
JOSEPH LANDIS, and THOMAS McNAMEE,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent.

IN SUPPORT OF REVERSAL

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION

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INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization with over 250,000 members dedicated to the protection of the civil rights and liberties of Americans. Foremost among the rights the constitution guarantees to those against whom the state arrays its power through the criminal justice system are the right of a defendant in a criminal case to counsel of his own choosing, and the right to prepare and execute the defense he thinks most appropriate. The ACLU submits this amicus curiae brief to urge the Court to protect the sanctity of these rights.

STATEMENT OF FACTS

Although the facts of this case are set forth more fully in petitioners' brief, amicus will briefly highlight the facts which it believes to be essential to disposition of the case.

Petitioners have each been indicted for alleged criminal conduct as members of the same police decoy team; they have each denied the charges brought against them; each sought counsel from the law firm of Sprague and Rubenstone before being indicted; and each wished to proceed with this same firm at trial. The government, however, filed a Motion for a Hearing and to Prohibit Multiple Representation under Fed. R. Crim. P. 44(c), seeking to disqualify Sprague and

Rubenstone from representing petitioners.

The district court held a hearing on the government's motion during which it questioned each petitioner fully and completely concerning his reasons for choosing to be represented by the same law firm as his co-defendants. In addition, the court advised each petitioner of the risks resulting from the decision to proceed with joint counsel. Each petitioner indicated his continued desire to be represented by the common counsel they all had chosen.

Following this full and complete hearing, the district court found that (1) no actual conflict of interest existed; (2) a conflict of interest was likely to arise; and

(3) each defendant had made an intelligent, knowing, and voluntary waiver of any claim of conflict of interest and had done so without financial pressure. The court, however, refused to allow petitioners to proceed with single representation and disqualified Sprague and Rubenstone from representing any of petitioners. The court based its ruling that petitioners could not be represented by Sprague and Rubenstone upon the competing interest of the "court's responsibility to supervise the professional conduct of attorneys practicing before it," which it held outweighed petitioners' rights to conduct a common defense with counsel of their choice. 527 F. Supp. at 906, A21.

The district court's order was affirmed by the court of

appeals which held that aside from the court's interests in not having convictions overturned on appeal because of ineffective representation of counsel--a concern which does not exist if defendants knowingly, intelligently, and voluntarily waive their right to conflict free counsel--the trial court might act on "concerns about breaches of professional ethics and about respect for the integrity of the Court." 679 F.2d at 1076, A10, citing United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978).

SUMMARY OF ARGUMENT

The procedural safeguards of the fifth and sixth amendments are facets of an underlying guarantee to those accused in federal criminal prosecutions of a right to

present their best legitimate defense. Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942). Petitioners have a legitimate interest in selecting particular counsel to present a joint defense. This interest goes to the heart of their right to present their best defense.

While petitioners also have a constitutional right to individual counsel, unaffected by a conflict of interest, this right may be waived. Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978). When the constitutional rights guaranteed by the fifth and sixth amendments come into conflict, the general purpose served by those amendments requires the court, absent compelling countervailing considerations, to defer to the judgment of the accused.

Here, petitioners have waived the right to individual counsel in order to exercise their right to pursue the defense strategy of their choice, by the tactics of their choice, with the counsel of their choice.

The only legitimate interests of the court and the government in petitioners' decision to pursue a common defense by joint counsel are served by a knowing, intelligent, and voluntary waiver of the right to separate counsel.

The court's interests in avoiding delay, needless retrials after convictions, and any appearance of unfairness are satisfied by a knowing, intelligent, and voluntary waiver of separate representation. The pursuit of a common defense by single counsel is more, not

less, efficient. A knowing, intelligent, and voluntary waiver of the right to separate counsel insulates a conviction from attack based upon a claim of infringement of that right. The court's third interest, in assuring that the proceedings before it both are fair and appear fair, is served by acceptance of such a waiver after hearing since it guarantees both that defendants' choice of a defense will be honored and that counsel will be aware of their responsibilities to both their clients and the court.

The government's interests in ensuring that convictions are not overturned because of ineffective assistance of defense counsel and that justice is done are satisfied by the knowing, intelligent, and

voluntary waiver. Moreover, a motion by the government to disqualify counsel may have an illegitimate purpose of preventing the accused from pursuing their best defense. It is for that reason that Rule 44(c) calls for the trial court to act on its own motion rather than on the motion of the government which has its own unwaivable conflict of interest when it seeks to disqualify defense counsel for the sake of the defendant.

ARGUMENT

CO-DEFENDANTS HAVE A CONSTITUTIONAL RIGHT TO BE REPRESENTED BY COUNSEL OF THEIR CHOICE, EVEN IF THEY CHOOSE TO BE REPRESENTED BY THE SAME LAWYER OR LAW FIRM

There are two basic reasons why petitioners and all defendants similarly situated should be

permitted to be represented by common counsel after a proper Rule 44(c) colloquy. First, when constitutional rights conflict, it should be the defendant, who will bear the consequences, and not the court or government, who should decide which right to exercise and which to waive. Second, a proper waiver of individual representation protects the interests of both the courts and the government.

A. It Is up to Each Defendant, Not the Courts or the Government, To Choose How To Conduct His Defense.

It is fundamental that a defendant is entitled to conduct not merely a defense against criminal charges, but "his best defense." Adams v. United States ex rel.

McCann, 317 U.S. 269, 279 (1942). It is further fundamental that it is the defendant, and not the government or the court, who decides what is the "best" defense in any particular case, for "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." Faretta v. California, 422 U.S. 806, 833-34 (1975) (footnote omitted).

An accused's constitutional right to present his "best defense" encompasses the right to pursue a defense strategy of his choosing, to employ those tactics he believes are best designed to effectuate that strategy, and to choose his own lawyer to conduct that defense. Each of the specific guarantees of the fifth and sixth amendment is designed

to effectuate this general purpose--that is, to allow the defendant to conduct his defense in the manner in which he deems best. See Faretta v. California, supra, 422 U.S. at 834. These individual rights were not adopted in a vacuum; rather, they dovetail together to guarantee to those accused in a criminal prosecution a right to present what he believes is his best legitimate defense. Adams v. United States ex rel. McCann, supra, 317 U.S. at 279.

While the different fifth and sixth amendment guarantees complement each other in most cases, there are situations in which the preservation of one right may prevent the full exercise of another. Since each of these rights was created to protect the defendant, when this conflict occurs, it is up to

the defendant to choose which right to forego in order to maximize the other, as this Court has recognized time and again. In Faretta v. California, supra, 422 U.S. at 834 (footnote omitted) (emphasis added), this Court stated:

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the

> State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." Illinois v. Allen, 397 U.S. 337, 350-51.

Thus, acceptance of the knowing and intelligent waiver of a specific right serves merely to effectuate the defendant's overriding right to conduct the defense of his own choosing, whether or not the court may think the choice a wise one.

Here, the right of each defendant to conduct his defense as he believes best conflicts with his right to individual counsel. There is no question that defendants have an absolute right to retain separate

counsel. See Holloway v. Arkansas, supra; Glasser v. United States, 315 U.S. 60 (1942). But there is also no question that a defendant in a criminal case may waive that right to individual counsel. Holloway v. Arkansas, supra, 435 U.S. at 483 n.5.

The courts below and the government suggest that existence of conflicting constitutional rights is so unusual that the trial court must exercise its supervisory power over how a defendant resolves the conflict. Such a conflict, however, is present in every trial. The fifth and sixth amendments give a defendant the right to testify on his own behalf as a part of his defense. But the fifth amendment also gives a defendant an absolute right to remain silent. The defendant

chooses, free of the court's supervision, which right to exercise to maximize his defense. In fact, when a defendant decides whether to testify, the trial court does not even conduct a colloquy to determine whether the choice of which right to waive is knowing, intelligent, and voluntary, depending, instead, on the defendant and his counsel to make the choice. In this case, by contrast, both the court and counsel questioned each defendant on the record and under oath to ensure that he understood the exact consequences of his decision to waive his right to individual counsel.

B. A Knowing, Intelligent, and Voluntary Waiver of Each Defendant's Right to Individual Counsel Serves the Interests of Defendants Without Compromising the Legitimate Interest of the Trial Court and the Government.

The sole question which the Court must decide in this case is whether a court may reject a defendant's decision to waive his right to individual counsel free of potential conflicts when that waiver is knowing, intelligent, and voluntary. Amicus submits that such a waiver must be accepted by the court because it fulfills each defendant's right to conduct a defense of his own choosing. In this case, a review of the legitimate interests of the government and the trial court reveals that none of those interests is compromised by accepting each defendant's

waiver of his right to individual counsel. Indeed, review of the specific interests of the trial court and the government confirms that acceptance of such a waiver enhances the specific interests of all involved.

1. The Knowing, Intelligent and Voluntary Waiver of Each Defendant's Right to Individual Counsel Allows the Defendants To Exercise Their Right To Decide How To Conduct Their Defense.

While individual counsel for each defendant may best serve each defendant in some cases, this is clearly not true in every case. Historically, joint representation has been effectively employed in a

wide variety of situations. Clarence Darrow, for instance, effectively represented multiple defendants in instances when they all alleged their innocence--as in the trial of Haywood, Moyer, and Pettibone for the murder of Idaho Governor Frank Steunenberg--and when they both admitted their guilt--as in the trial of Leopold and Loeb for the murder of Bobby Franks. See Attorney For the Damned 16-88, 410-88 (Arthur Weinberg ed. 1957). Similarly, joint representation by a trial team headed by Thomas D. McBride and Joseph A. Lord, 3d, was effectively employed when multiple defendants, charged with different violations of the Smith Act, nonetheless maintained their innocence because the substantive offenses of

which they were charged were unconstitutional. See United States v. Kuzma, 249 F.2d 619 (3d Cir. 1957); United States v. Kuzma, 141 F. Supp. 619 (E.D. Pa. 1954). Indeed this Court has recognized that not only can "multiple defendants . . . [be] appropriately . . . represented by one attorney; indeed, in some cases, certain advantages might accrue from joint representation." Holloway v. Arkansas, supra, 435 U.S. at 482-83.

The sixth amendment's guarantee of effective assistance of counsel entails many elements in addition to the right to counsel free of potential conflicts. Other facets of effective assistance of counsel include the confidence counsel engenders in his client, the capacity of counsel to communicate with his client, and the peculiar ability to

present the defense sought by his client. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932); United States v. Laura, 607 F.2d 52 (3d Cir. 1979); see also The Constitution of the United States: Analysis and Interpretation, 1221 (U.S. Government Printing Office 1972). The reasons why an individual might select the same counsel to conduct his defense as has been selected by his co-defendants are both personal and strategic. In either case, they are legitimate and must be recognized to be part of a defendant's right to choose how to conduct his own defense.[1]

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1. Amicus does recognize that a defendant has no right to demand a particular counsel when he cannot afford that lawyer or when that lawyer is unavailable

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There are a number of reasons why several defendants in a case may choose the same person as their lawyer. Courts have recognized that not all lawyers are equal. The Court of Appeals for the Third Circuit itself stated:

> "We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular

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> for the representation or declines to accept the representation for any reason. However, these considerations have no bearing in this case since petitioners' chosen counsel, Sprague and Rubenstone, has agreed to represent them and remains ready to do so. Thus, the issue is whether the court can upset each petitioner's choice of counsel when that counsel is prepared to proceed.

> legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a defense. It is generally the defendant's right to make a choice from the available counsel in the development of his defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment." United States v. Laura, supra, 607 F.2d at 56.

Thus, several defendants may seek the same lawyer in a case because that lawyer's skills are suited uniquely to the particular facts of that case.

There are also a number of purely personal considerations which affect extremely significant intangible aspects of a lawyer-client relationship. An accused may not

trust any but one particular counsel. This confidence may be born of prior experiences with counsel, political considerations, social background, linguistic expertise, or ethnic roots. Whatever reasons foster the client's confidence in the attorney-client relationship, they are a part of the guarantee of effective assistance of counsel and are not inconsequential considerations.

Further, each defendant in a case may decide that he can conduct his "best defense" by pooling his financial resources with those of other defendants to hire one extremely specialized or especially competent trial lawyer rather than two or more less able, less costly advocates. While the trial court may find it easier to deal with

separate counsel and the government might prefer to try the case against a large number of less experienced lawyers, it is the defendant's right to decide how to conduct his defense which should govern who serves as counsel. Moreover, it is likely that in some smaller communities the pool of attorneys experienced in handling criminal matters is so limited that in some cases co-defendants may be compelled to hire the same lawyer to get even minimally competent counsel.[2]

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2. Out-of-town counsel may be no answer. Clarence Earl Gideon's acquittal after he won the right to be represented by counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), has been attributed to his decision to reject an offer of representation of outstanding Miami counsel in favor of local counsel from Panama City who knew the community and its people. See A. Lewis, Gideon's Trumpet 223-38 (Random House, 1964).

Second, there are strategic reasons separate and apart from the individual characteristics of the lawyer sought by multiple defendants which justify defendants hiring the same lawyer. Each defendant may decide it is in his best interest to participate in a common defense conducted by common counsel. The prudence of this strategy in the appropriate case has been recognized by this Court:

> In Mr. Justice Frankfurter's view: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."

Holloway v. Arkansas, supra, 435 U.S. at 482-83, quoting Glasser v. United

States, supra 315 U.S. at 92 (Frankfurter, J. dissenting).[3]

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3. The advantages of a common defense, moreover, are not limited to situations in which all defendants assert their common innocence. Clarence Darrow effectively employed joint representation in his defense of Leopold and Loeb for the kidnapping and murder of Bobby Franks. The two defendants' participation and culpability in these crimes differed: Richard Loeb, the younger of the two boys, was the leader, obsessed with a desire to commit a "perfect crime" and wielded the chisel which ended Bobby Frank's life; Nathan Leopold, the older of the two, fed Loeb's schemes with his cooperation and approval. A potential conflict clearly existed. Separate counsel could have been expected to show that the other defendant was the more evil, the more culpable, the more deserving of punishment, to the ultimate detriment of both. Darrow instead demonstrated not how one defendant was better or worse than the other, but how the crimes which they committed together were the result of an evil which was greater than the sum of their individual weaknesses. Because

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There are also a number of practical reasons why defendants who have chosen to conduct a common defense would also decide to proceed with one lawyer to conduct that defense. The defendants may feel that it is in their best interest to not have numerous lawyers on their side of the courtroom against a single prosecutor. Even if the separately-represented defendants could choose one lawyer to conduct all cross-examination, the jury may be bewildered by the fact that counsel for

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> Darrow showed how their crime was the result of a peculiar marriage of their undeveloped personalities, he was able to save them both from the gallows. Attorney For the Damned 16-88 (Arthur Weinberg, ed. 1957) This defense was effective, ethical, and would have been barred if the lower courts in this case had been then sitting in Illinois.

the other defendants do not ask any questions. Again, the use of common counsel guarantees unitary leadership. In short, the defendants pursuing a common defense may well decide that too many lawyers spoil the case.

Common counsel also ensures that all communications made by the individuals to their lawyers are protected by the attorney-client privilege. Ideally, all defendants would confer with all counsel in preparing a joint defense, but this course would invite a government challenge to the privilege. If each defendant communicates only with his own counsel in order better to protect the privilege, there is a danger of miscommunication or misunderstanding through the additional step which would be necessary if the various lawyers then gather to prepare the

common defense. Further, the government has taken the position in a number of cases that communication between lawyers in the same case results in a waiver of the attorney-client privilege with respect to the subject of that communication. See, e.g., In the Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974, 406 F. Supp. 381, 387 (S.D.N.Y. 1975). While some courts have recognized that the communication among defense counsel in pursuit of a common defense is protected by the attorney-client privilege, there is no guarantee that this will be true.

Finally, there are important associational and political reasons why several codefendants might wish to stand together with one defense team. It may be that it is more important to each defendant

in some cases to test a law's validity than to avoid punishment for its violation. Thus, groups of people or organizations who find themselves or their purpose threatened by a statute may decide that it is more important to challenge the act or its application than the government's proof of its violation. See, e.g., Edwards v. South Carolina, 372 U.S. 229 (1963); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963).

More important to the facts of this case, there are occasions when individual acquittal would mean less to a defendant than vindication of his group. For example, members of a union executive committee, a corporate board of directors, a town council, or a police squad may find that their good names would be damaged by

a showing through the conviction of some members that the group was corrupt, even though an individual member might be acquitted on a showing that he had been duped or that the charges against him were barred on technical grounds. Particularly where, as here, all of petitioners maintain their innocence, they have a legitimate interest in sticking together to vindicate the honor of their squad, their force, and their profession. See A72-74.

Both personal and strategic reasons for proceeding with the same law firm were here cited by petitioners in their colloquies. Robert Flanagan informed the court that he chose to remain with Sprague and Rubenstone as his lawyers because he had developed confidence in their

abilities throughout the representation. Further, Flanagan specifically noted that he was "comfortable" with the manner in which the representation had been handled to date. A.68. Strategic reasons for proceeding with the same lawyer were relied upon by the three other petitioners. Each informed the court that he believed he was in the same position with respect to the government's charges as were his partners. Therefore, each felt it was in his individual best interest to pursue the common defense through a single lawyer. A.68-74.

Each petitioner decided that since the defense that he desired to present was consistent with that desired by each of the others, his personal confidence in Sprague and Rubenstone and the practical considerations involved with dealing

with one lawyer and having one lawyer appear as spokesman for all in court outweighed any theoretical disadvantages which might be associated with the potential for conflict of interest which is present when a lawyer represents more than one co-defendant.

This Court has recognized that multiple representation is not per se ineffective representation. See Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); Holloway v. Arkansas, supra. It is up to the defendants to weigh the advantages and disadvantages associated with the choice to proceed with the same counsel, so long as that decision is made knowingly, intelligently, and voluntarily. Once defendants have articulated a rational reason for proceeding with joint counsel, the

trial court must defer to their judgment.

It is not the trial court's duty to decide whether each defendant is best served in the court's view by that defense. The trial court need only assure itself that the decision was arrived at knowingly, intelligently, and voluntarily. If a defendant articulates a rational reason for his choice, the trial court has no business second-guessing that choice--the defendant, not the court, is on trial. This is particularly true when each of the trial court's interests is satisfied completely once it has assured itself that the defendant's decision to waive his right to individual counsel was made knowingly, intelligently, and voluntarily.

2. A Knowing, Intelligent, and Voluntary Waiver Protects the Trial Court's Legitimate Interests in Avoiding Delay, Needless Retrials after Convictions, and Any Appearance of Unfairness.

The trial court has a threefold interest in the conduct of criminal trials before it. First, the court has an interest in avoiding delay so that it may proceed with its docket. Second, the court has an interest in avoiding attacks on convictions and needless retrials after the court has expended its resources in conducting a trial. Third, the court has an interest in ensuring that justice is done and that it is done with an appearance of fairness. Acceptance of a knowing, intelligent, and voluntary waiver of a defendant's

right to individual counsel satisfies all of these interests.

The use of single counsel is likely to be more efficient in a case involving multiple defendants. As Justice Powell noted in his Holloway dissent:

> "Each addition of a lawyer in the trial of multiple defendants presents increased opportunities for delay in setting the trial date, in disposing of pretrial motions, in selecting the jury, and the conduct of the trial itself. Additional lawyers also may tend to enhance the possibility of trial errors." Holloway v. Arkansas, supra, 435 U.S. at 494 n.2.

The trial court's interest in expediting proceedings is, therefore, actually served by a waiver of separate representation.

The trial court's interest in avoiding needless retrials because

convictions are overturned is served by a knowing and intelligent waiver of the right to separate counsel. This Court has made it clear on numerous occasions that a knowing, intelligent, and voluntary waiver of a right insulates a conviction from attack based upon a claim of infringement of that right. See, e.g., Faretta v. California, 422 U.S. 806 (1975) (waiver of counsel); North Carolina v. Alford, 400 U.S. 25 (1970) (waiver of trial and plea of guilty).

The court's interest is in assuring that the proceedings before it not only are fair but appear fair is reflected in the manner in which the court deals with the defendant directly. Here, the court had a full and complete colloquy with each petitioner about his decision to retain the Sprague and Rubenstone law firm.

This colloquy included disclosure by defense counsel of their discussions with each petitioner of the specific matters which might be affected by that individual's choice of representation by the common law firm. After this colloquy, each petitioner reaffirmed his choice of Sprague and Rubenstone as his counsel. Indeed, to deny defendants the right to proceed with counsel of their choice after such a colloquy not only appears unfair; it is unfair. It makes a mockery of the entire proceeding as it denies defendants their choice of counsel even though the court is satisfied with the choice was made freely and intelligently.

Rule 44(c) of the Federal Rules of Criminal Procedure mandates just such a colloquy as the district court conducted in this case. It

then requires that, unless it appears that a conflict of interest is not likely to arise, "the court shall take such measures as may be appropriate to protect each defendant's right to counsel." That is, the Rule's purpose is not to deny defendants their choice of multiple representation but to provide a mechanism to be sure that multiple defendants will not be denied their right to counsel.

As the notes of the Advisory Committee on Criminal Rules make clear, citing United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978), an order requiring separate counsel "may be necessary where the trial judge is 'not satisfied that the waiver is proper.'" Examples cited include defendants of limited competence and defendants in cases where no one can

foresee the prejudices of multiple representation. The trial judge found no such limitations in the waiver in this case.

Nor is there a danger that multiple representation in this case will cause counsel to violate the standards of legal ethics, even if ethical considerations would sometimes permit a court to deny a defendant the constitutional right to competent counsel of his choice. Indeed, the Code of Professional Responsibility, like Rule 44(c), is aimed at protecting the right to counsel, not at limiting it.

Moreover, the Canons of Ethics and the Disciplinary Rules of the Code make it clear that joint representation need not be unethical representation. The Disciplinary

Rules specifically permit joint representation when a lawyer concludes that he can adequately represent the interest of each defendant and "each [defendant] consents to the representation after full disclosure of the possible effect of such representation . . . ." DR 5-105(c)

There is no question in this case that each petitioner chose to proceed with common counsel after the possible effects of multiple representation in each individual's case were discussed fully with him. An ethical violation could have occurred, if at all, therefore, only if the second prong of the Disciplinary Rule's test was not met--that is, if counsel could not "adequately represent the interest of each" of these petitioners, a determination left to

counsel by DR 5-105. Obviously, counsel here found that they could adequately represent the interest of each since they proceeded with the representation.

Ordinarily, the court abides by "the good faith and good judgment of defense counsel" in deciding to undertake a joint representation. Cuyler v. Sullivan, supra, 446 U.S. at 347. In fact, only defense counsel and defendant are in any position to evaluate fully the impact of joint representation on that defendant's case. The prudence of multiple representation must be viewed on a case-by-case, individual-by-individual basis. This review can only be taken after analysis of all the facts available in a particular case. The attorney for the defendants is the only one in a position to gather these

facts before trial. Thus, this Court has acknowledged an attorney representing multiple defendants is in the best position professionally and ethically to determine when a conflict of interest exists which will impair his ability to represent each client adequately. See Cuyler v. Sullivan, supra, 446 U.S. at 347; Holloway v. Arkansas, supra, 435 U.S. at 485. See also Final Draft of the Model Rules of Professional Conduct Rule 1.7 Comment: Conflict Charge by Opposing Party.

Moreover, the prompt inquiry required by Rule 44(c) makes it even more difficult for a trial court to determine either the probability of a conflict or the likelihood that common counsel will be unable to represent the interests of all defendants adequately should such

a conflict occur. At that point, the court is likely to know no more about the case than the facts which appear in the indictment on information.

Even counsel may not know what conflicts, if any, will occur between the positions on which his clients may find themselves as the case progresses. What counsel and clients can have done, however, is to explore potential conflicts and to determine whether, knowing of these conflicts, the clients want to proceed with common counsel. If the clients do want to conduct their defense through common counsel, D.R. 5-105(c) requires counsel to determine whether he can effectively represent the interests of all his clients. If he cannot, the Code prohibits him from continuing with the multiple representation.

If counsel does continue to represent more than one co-defendant, the court can and must then determine whether there is an actual or potential conflict which has not been knowingly and intelligently waived.[4] It can also question counsel on his awareness of his ethical obligation not to undertake a representation in

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4. Amicus submits that a trial court would have to accept a defendant's knowing, intelligent, and voluntary waiver of his right to conflict-free counsel even when there is an actual conflict. See, e.g., United States v. Curcio, 680 F.2d 881 (2d Cir. 1982); United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). Although that issue is not before this Court in this case since the district court found no actual conflict, the same considerations discussed in this brief would apply to actual as well as potential conflicts.

which he cannot effectively represent the interests of all his clients.

On the other hand, even if it wants to protect defendants against an unwise waiver of individual counsel, the court cannot hope to do an intelligent job of second guessing counsel's determination that he is capable of effectively representing the interests of multiple defendants. Since that decision can only be made on the basis of knowledge which is peculiar to counsel and defendants, the court must rely on the operation of the disciplinary procedures upon the rare lawyer who improperly undertakes a joint representation. It cannot use the possibility that some lawyer somewhere has unethically undertaken a representation in which he cannot further the interests of all of his clients as an

excuse for denying all multiple defendants the right to make a conscious and perhaps wise choice to proceed with common counsel.

In sum, every legitimate interest of the court is satisfied by a knowing, intelligent, and voluntary waiver of each defendant's right to individual counsel. The court's interest in avoiding delay is actually served by single defense counsel. Further, the court's concern in avoiding the overturning of convictions on the basis of ineffective assistance of counsel is protected fully by the knowing, intelligent, and voluntary waiver. Finally, acceptance of the knowing and intelligent waiver after a proper Rule 44(c) colloquy ensures the fairness and appearance of fairness in the trial; indeed rejection of the waiver is and appears arbitrary.

Therefore, a defendant's knowing, intelligent, and voluntary waiver of the right to separate representation must be accepted.

3. A Knowing, Intelligent and Voluntary Waiver of the Right to Individual Counsel Satisfies the Government's Interests in Preventing Convictions From Being Overturned and in Doing Justice.

The constitution guarantees every defendant the right to counsel. The courts are concerned with seeing to it that the right is effectuated. Where multiple representation is involved, Rule 44 (c) directs the trial court to make inquiry, sua sponte, into the danger to effective assistance of counsel posed by the use of common counsel. Neither the constitution nor Rule 44(c), however, gives

the government responsibility for determining who shall represent a defendant in a criminal case, and any attempt by the prosecutor to control what counsel shall oppose him is inherently suspect.

That is not to say that the government has no legitimate concern in who may represent a defendant in a criminal case. In any criminal proceedings, the government has an interest in convicting the guilty and in preventing those convictions from being overturned after trial. Ineffective assistance of counsel is a frequent basis for retrials. As noted above, however, the knowing, intelligent, and voluntary waiver of separate counsel ensures that convictions legitimately obtained will not be

overturned on the grounds of ineffective assistance of counsel due to joint representation.

The government has a second interest in ensuring that justice shall be done. In Berger v. United States, 295 U.S. 78, 88 (1935), this Court established the standard:

> The United States Attorney . . . . is in a particular and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The government's interest in justice is in fact enhanced by the waiver since it permits each

defendant to proceed with the defense of his choosing. In this case, the government's interest in doing justice would be jeopardized if petitioners may not proceed with the joint representation because, for the reasons stated above, the court would be impinging upon petitioners' ability to present their best defense.

Since the government's legitimate interests are protected fully by a knowing, intelligent, and voluntary waiver of a defendant's right to individual counsel, any efforts by the government to disqualify counsel notwithstanding that waiver must be viewed with suspicion. Indeed, this Court should be sensitive to the fact that any motion to disqualify opposing counsel may be motivated by illegitimate reasons completely unrelated to

the pursuit of justice. The ABA Commission on Evaluation of Professional Standards has cautioned that:

> Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be used as a technique for harassment. Final Draft of the Rules of Professional Conduct, Rule 1.7 Comment: Conflict Charge by an Opposing Party.

The government does not have a legitimate interest in second-guessing the decision of defense counsel or the defendants.

Nor does the government have a legitimate interest in disqualifying a particular lawyer to facilitate its task of proving guilt in a particular case. This, however, seems to have been part of the motivation

which persuaded the Court of Appeals for the Third Circuit to conclude that joint representation should be prohibited in United States v. Dolan, 570 F.2d 1177, 1182 (3d Cir. 1978):

> ...there are public interests which impel an attorney's withdrawal from representing multiple defendants absent a knowing and intelligent waiver. Joint representation creates the possibility of defendants 'stone-walling'--obstructing Government attempts to obtain cooperation of one of a group of defendants.

While there may be an additional concern with establishing that each of the defendants really has made a personal and knowing choice of common counsel when even those co-defendants who might benefit from cooperating with the government refuse to do so, the rationale of Dolan seems to be that the government has a legitimate

interest in the ease with which it obtains convictions which the court may consider in determining whether to allow joint representation. That rationale is directly contrary to each defendant's right to conduct and manage a defense of his own choosing as guaranteed by the sixth amendment.[5]

Finally, if the government believes that waiver is not fully informed, it should not be able to rest merely upon the allegations of the

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5. The United States Attorney for the district in which this case was brought is a vigorous opponent of multiple representation. See P. Vaira & D. Huyett, Time for a Rule Certain: A Proposal to End Representation of Multiple Grand Jury Witnesses, 85 Dick. L. Rev. 381 (1981). Remarkably, defense counsel, who do represent the interests of defendants and who have the most to gain from an absolute bar against multiple representation, appear to have written none of the articles which attack that practice.

indictment or information and platitudes offered in its memorandum of law in support of the motion to disqualify. If the government has specific information that the evidence to be presented in its case is likely to create actual conflicts of which defendants may not be aware, the government should make that information available to the court as soon as possible. This will ensure that everyone's interest in a knowing and intelligent waiver is served since each defendant will be able to make a more informed choice as to how he wishes to proceed. No such offer was made by the government in this case.

In short, a knowing, intelligent, and voluntary waiver satisfies every legitimate interest of the prosecutor. The fact that the prosecutor seeks to require more of

a defendant than this waiver creates the strong likelihood that the government's motivation in seeking to disqualify counsel extends beyond its interest in seeing that justice is done.

CONCLUSION

Since the interests of defendants, court, and government are satisfied fully by a knowing, intelligent, and voluntary waiver of each defendant's right to individual counsel, each petitioner must be permitted to proceed with counsel of his choice to conduct the defense of his choice. Accordingly, the order of court below affirming the order of the trial court

disqualifying counsel should be reversed and the matter remanded for trial.

Respectfully submitted,

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